

U.S. Department of Labor

Office of Administrative Law Judges
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In the Matter of:

Date Issued: **January 12, 2001**

LINCOLN C. PLUMLEE,

Case No.: 2000-BLA-0446

Claimant,

vs.

OLD BEN COAL CO.,

Employer,

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS,

Party-in-Interest
.....

John D. Mitchell, Jr., Esquire
For the Claimant

Richard H. Risse, Esquire
For the Employer

Before: Edward Terhune Miller
Administrative Law Judge

DECISION AND ORDER - REJECTION OF CLAIM

Statement of the Case

This proceeding involves a first claim for benefits under the Black Lung Benefits Act as amended, 30 U.S.C. §§ 901 *et seq.* ("the Act"), and the regulations promulgated thereunder.¹ Since

¹All applicable regulations which are cited are included in Title 20, Code of Federal Regulations, unless otherwise indicated, and are cited by part or section only. Director's Exhibits are denoted "D-"; and citations to the hearing transcript are denoted "Tr." Claimant did not

this claim was filed after March 31, 1980, Part 718 applies. §718.2 Because the Claimant Miner was last employed in the coal industry in Illinois, the law of the Seventh Circuit of the United States controls. (D-22) *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Claimant filed this claim for benefits on May 5, 1999. (D-1) It was initially denied by the District Director on August 6, 1999, finding that Claimant does not have pneumoconiosis, that his pneumoconiosis is not due to coal mine employment, and he is not totally disabled by the disease. (D-15) The Claimant requested a hearing, and the claim was referred to the Office of Administrative Law Judges. (D-24, D-25) A formal hearing was held on November 28, 2000, in Carbondale, Illinois. Exhibits D-1-32 and E-1-4 were admitted into evidence without objection.

Issues

1. Has the Claimant proved the existence of coal workers' pneumoconiosis?
2. Was the Claimant's pneumoconiosis, if proved, caused by his coal mine employment?
3. Is the Claimant totally disabled due to pneumoconiosis?

Findings of Fact, Conclusions of Law, and Discussion

Background, Dependents, and Coal Mine Employment

Claimant, Lincoln Charles Plumlee, was born on March 25, 1927, and possesses an eighth grade education. For the purposes of augmentation of benefits, Claimant has a dependent wife, Roberta Plumlee, and child, Chelsea Plumlee. (D-1, D-3, D-6) The parties stipulated to forty-three years of qualifying coal mine employment, and that Old Ben Coal Co. is the responsible operator. (D-1, Tr. 8) Claimant last worked as a coal miner in August of 1998. (Tr. 11) Based upon the stipulation, Claimant's application, and employment and Social Security records, this tribunal finds 43 years of qualifying coal mine employment.

submit additional evidence at the hearing.

Medical Evidence

X-rays

Exhibit	Date of X-ray	Doctor	Qualifications²	Interpretation	Quality
D-32	03/08/79	Sargent	BCR/B	Category 1	
D-22	05/11/98	A. Shores	–	Negative	
D-22	05/11/98	K. Kraudel	–	Negative	
D-22	11/18/98	P. Shekar	–	Negative	
D-21	06/14/99	Wiot	BCR/B	Negative	
D-12	06/14/99	Mitchell	–	Positive, 1/0	
D-8	06/17/99	Sanjabi	–	Positive, 1/1	
D-29	10/19/99	C. Myers	–	Negative	1
D-28	10/19/99	Perme	B	Negative	2, dark
D-27	10/19/99	Shipley	BCR/B	Negative	2, dark
D-26	10/19/99	Wiot	BCR/B	Negative	2
D-20	10/19/99	Tuteur	B	Negative	
E-3	10/19/99	Renn	B	Negative	3
E-1	10/19/99	Spitz	BCR/B	Negative	2, overexposed

²The abbreviation “BCR” denotes a board-certified radiologist. The abbreviation “B” denotes a B-reader.

Pulmonary Function Studies³

Exhibit	Test Date/ Height/Age	Doctor	FEV1	FVC	MVV	Qualifying
D-20	10/19/99 68"/73	Tuteur	2.30 2.28*	4.15	71	No
D-7	6/14/99 67 ½ "/72	Sanjabi	2.21	4.33		No

*Post-Bronchodilator

Arterial Blood Gas Studies

Exhibit	Test Date	Doctor	pO2	pCO2	Qualifying
D-9	6/17/99	Sanjabi	38	41	Yes ⁴
D-20	10/19/99	Tuteur	83	36.3	No

Medical Reports/Opinions

Dr. Annette Shores, a board-certified surgeon, performed an endarterectomy on Claimant's left carotid on May 13, 1998, noting that the Claimant tolerated the treatment well.⁵ Dr. Shores also performed a post-surgical consultation with respect to Claimant on September 3, 1998. During the consultation the doctor recorded Claimant's social and medical histories, noting Claimant's history of extremely heavy cigarette smoking and heavy drinking, and performed a physical examination of Claimant. The doctor recommended that Claimant's carotids be reevaluated. (D-22) The doctor's

³Both tests were conforming.

⁴Dr. Richard Katzman, board-certified in internal medicine, was consulted regarding these blood gas results, on July 15, 1999, and noted that the patient was sent to the hospital because of severe hypoxemia, but could not determine whether the test was venous because he did not know Claimant's history. (D-10) Dr. Tuteur opined that the test was venous because the number is an abnormality. The doctor noted that even if it is arterial blood, whatever caused the abnormality was reversed by October 19, 1999, and pneumoconiosis is an irreversible process. (E-2)

⁵The qualifications of Dr. Shores were not contained within the record.

evaluations and reports did not contain any findings of occupational related diseases or any findings as to the extent of Claimant's disability.

Dr. Parvi Sanjabi, who's qualifications have not been established in the record, examined the Claimant on June 17, 1999. The doctor recorded Claimant's medical and social histories, performed specified medical tests, and interpreted an x-ray as positive for pneumoconiosis, 1/1. The doctor noted Claimant's significant histories of cigarette smoking and coal mine employment. Dr. Sanjabi opined that Claimant has coal workers' pneumoconiosis and COPD, due to his exposure to coal mine dust and his cigarette smoking. The doctor noted that Claimant was in need of an immediate cardiac evaluation, which the doctor noted, he refused. Dr. Sanjabi's report did not contain any findings regarding the extent of Claimant's impairment. (D-7, D-8, D-9)

Dr. Peter Tuteur, board-certified in internal medicine and pulmonary disease, examined Claimant on October 19, 1999. The doctor recorded Claimant's medical and social histories, noting significant exposure to coal mine dust and nearly 60 years of heavy cigarette smoking. Dr. Tuteur performed a physical examination, noting no acute distress. The doctor, a B-reader, read an x-ray as negative for pneumoconiosis, and noted that a CT Scan revealed mild emphysema, but no evidence of pneumoconiosis. Dr. Tuteur also performed pulmonary function studies and arterial blood gas studies, both of which produced results within the normal range and revealed no significant impairment. Based upon his examination, recorded histories, and tests, the doctor opined that Claimant does not have coal worker's pneumoconiosis or any other coal mine dust induced disease. Dr. Tuteur opined that Claimant does have chronic obstructive pulmonary disease, manifested as emphysema, attributable to his cigarette smoking. The doctor noted that the condition, which produces only a minimal obstructive defect, is unrelated to coal mine dust exposure. (D-20)

In addition to his personal examination of Claimant, Dr. Tuteur reviewed specified medical evidence of record, and wrote a separate report dated July 17, 2000. Based upon his review of Claimant's social and medical histories, specified medical tests, physical examinations, and numerous x-ray interpretations, the doctor opined that there was no convincing evidence of coal workers' pneumoconiosis. Dr. Tuteur noted that Claimant does have cerebral vascular insufficiency associated with hypertension, and an apparent deglutition disorder. The doctor noted that Claimant has centrilobular emphysema and chronic bronchitis, attributable to his cigarette smoking, and unrelated to his coal mine dust exposure. Recognizing that Claimant's history of coal mine dust exposure was sufficient to produce coal workers' pneumoconiosis in a susceptible host, the doctor assessed the entire record in light of this possibility. Dr. Tuteur opined that Claimant's symptoms were characteristic of chronic bronchitis, and that Claimant has hypertension that is associated with cerebral vascular disease, and not coal workers' pneumoconiosis. (E-2)

Dr. Joseph Renn, III, board-certified in internal medicine and pulmonary disease, reviewed specified medical evidence of record, and wrote a consultative report dated August 9, 2000. The doctor noted Claimant's coal mine employment and 116-pack years of cigarette smoking. Based upon a review of the medical reports, x-ray interpretations, his own x-ray interpretation, and specified medical tests, the doctor concluded that Claimant has chronic bronchitis and pulmonary disease due

to his years of cigarette smoking.⁶ The doctor opined that Claimant does not have pneumoconiosis. The doctor concluded that Claimant's pulmonary emphysema, chronic bronchitis, old pulmonary granulomatous disease, left upper zone partially calcified pleural plaque, arteriosclerotic coronary vascular disease, arteriosclerotic peripheral vascular disease, systemic arteriosclerotic cerebral vascular disease, and Dupuytren's contractures, were not caused, or aggravated by, Claimant's exposure to coal mine dust. Dr. Renn further opined that Claimant is not totally and permanently disabled to the extent that he would be unable to perform his last coal mining job or similar work. (E-3)

Elements of Entitlement

In order to establish entitlement to benefits with respect to a living miner's claim pursuant to Part 718, a claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment and that his pneumoconiosis is totally disabling. §§718.1, 718.202, 718.203, 718.204. Failure of Claimant to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Benefits under the Act are awarded to persons who are totally disabled within the meaning of the Act due to pneumoconiosis. For the purposes of the Act, pneumoconiosis, commonly known as black lung, means a chronic dust disease of the lung, and its sequelae, including respiratory or pulmonary impairments, arising out of coal mine employment. A disease arising out of coal mine employment includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment. §718.201

Pneumoconiosis

Section 718.202(a) prescribes four bases for finding the existence of pneumoconiosis: (1) a properly conducted and reported chest x-ray; (2) a properly conducted and reported biopsy or autopsy; (3) reliance upon certain presumptions, which are set forth in §§718.304, 718.305, 718.306; (4) or a finding by a physician of pneumoconiosis as defined in §718.201, which is based upon objective evidence and a reasoned medical opinion. The record contains no evidence of a biopsy, and the presumptions under §§718.304, 718.305, and 718.306 are inapposite because there is no evidence of complicated pneumoconiosis, because the claim was filed after 1981, and because miner is living.

Eleven of the fourteen x-ray interpretations of record were read as negative for pneumoconiosis. Of the eleven negative interpretations, four were read by dually qualified doctors, doctors who were both B-readers and board-certified radiologists. Two positive interpretations were read by B-readers. Of the three positive interpretations, only one was read by a dually qualified

⁶ Dr. Renn, a B-reader, interpreted an x-ray as negative for pneumoconiosis.

physician, and two were read by doctors that were neither B-readers nor board-certified radiologists. When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985) This tribunal finds that the clear weight of the x-ray interpretations by physicians with the best credentials indicates that Claimant does not have pneumoconiosis. Thus, Claimant has not established the existence of the disease pursuant to §718.202(a)(1).

Section 718.202(a)(4) provides that a claimant may establish the existence of pneumoconiosis if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the claimant suffers from pneumoconiosis. In evaluating the opinions of physicians, the administrative law judge must initially determine whether each medical report of record relevant to the issue was reasoned and documented, and must provide reasons for discounting opinions, as required by the APA.⁷

The record contains five doctors' reports written by four doctors. Of the reports, only four make determinations as to whether Claimant has any occupational related disease, with only Dr. Sanjabi opining that Claimant has pneumoconiosis. This tribunal finds the consultative reports of Drs. Tuteur and Renn, and the examination report of Dr. Tuteur, opining that Claimant does not have pneumoconiosis, to be more persuasive than Dr. Sanjabi's report. Drs. Renn and Tuteur wrote consultative reports that were based upon their review of the medical evidence of record. These reports are well documented and reasoned, providing detailed analyses and evaluations of all of the medical tests, Claimant's histories, x-ray interpretations, and examinations. Drs. Tuteur and Renn, both B-readers, also based their determinations in part, upon their negative interpretations of an x-ray film. Both reports thoroughly evaluated Claimant's condition in light of his extensive cigarette smoking history and coal mine employment. Thus, this tribunal finds both reports to be persuasive.

However, this tribunal may accord diminished weight to a doctor's opinion if he has not examined the Claimant. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Wilson v. United States Steel Corp.*, 6 BLR 101955 (1984). Thus, the reports of Drs. Sanjabi and Tuteur's personal examinations of Claimant, may be accorded greater weight than the non-examining report of Dr. Renn, if the examining reports are well reasoned and documented. Dr. Tuteur's report of his examination of October 19, 1999, is both well documented and well reasoned. The doctor determined that Claimant's chronic obstructive pulmonary disorder resulted from his nearly 50 years of heavy cigarette smoking. Dr. Tuteur based his determination upon Claimant's histories, physical examination, x-ray interpretation, and specified tests. The doctor recorded his results, interpreted them, and explained his conclusions. Dr. Sanjabi's report, however, is not well reasoned. Dr. Sanjabi opined that Claimant had COPD and CWP, without specifying what evidence he relied upon or what his findings revealed. An unsupported medical conclusion is not a reasoned opinion. *Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir.

⁷5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a).

1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his diagnosis). Thus, Dr. Sanjabi's report, which is not well reasoned, is less persuasive than the well reasoned and documented reports by Drs. Tuteur and Renn.

Additionally, Drs. Tuteur and Renn's opinions are given more weight because the doctors have superior credentials. Both doctors are board-certified in internal medicine and pulmonary disease; the qualifications of Dr. Sanjabi are not established in the record. Experts' qualifications may be considered to give added weight to their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323.⁸

Dr. Tuteur's reports are entitled to the greatest weight because he has superior qualifications, he personally examined Claimant, and his opinion is better reasoned than Dr. Sanjabi's. The consultative report of Dr. Renn is better reasoned than Dr. Sanjabi's report, and therefore is accorded greater weight. Accordingly, this tribunal finds that the best reasoned and most qualified physicians' opinions indicate that Claimant does not have pneumoconiosis.⁹ In addition, because Claimant could not prove pneumoconiosis by x-ray, biopsy or any of the presumptions under §§718.304, 718.305, or 718.306, the Claimant has failed to establish the existence of pneumoconiosis under §718.202(a)(1)-(4). Thus, Claimant has not proven the existence of pneumoconiosis under any of the criteria of §718.202(a), and he therefore, cannot establish total disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to §718.204(b). *See Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000) Accordingly, benefits are denied.

Attorney's Fee

The award of an attorney's fee under the Act may be approved only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services of an attorney rendered to the Claimant in pursuit of this claim.

⁸Dr. Sanjabi interpreted an x-ray as positive for pneumoconiosis. Dr. Sanjabi's opinion is not discredited simply because it was based upon an x-ray interpretation which was outweighed by other x-ray interpretations of record. *See Fitch v. Director, OWCP*, 9BLR 1-45, n.2 (1986). However, because this tribunal finds the weight of the x-ray evidence to be negative for pneumoconiosis, the opinions of Drs. Tuteur and Renn, B-readers whose negative x-ray interpretations were consistent with the majority of x-ray readings, are more persuasive than Dr. Sanjabi's.

⁹ Because Claimant has failed to establish the existence of pneumoconiosis, although he has established that he worked in the mines for longer than ten years, he is not entitled to a rebuttable presumption under §718.203(b) that his disease arose from coal mine employment.

ORDER

The claim of Lincoln C. Plumlee for benefits under the Act is hereby denied.

EDWARD TERHUNE MILLER
Administrative Law Judge
WASHINGTON, DC

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. §725.481, any interested party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a notice of appeal with the **Benefits Review Board, P.O. Box 37601, Washington, D.C. 20013-7601**. A copy of the notice of appeal must also be served on Donald S. Shire, Esquire, Associate Solicitor, Room N-2117, 200 Constitution Avenue, N.W., Washington, D.C. 20210.